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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1755 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgement? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

KAUSHIK CONSTRUCTION COMPANY

Versus

STATE OF GUJARAT

Appearance:

MR HK PARMAR for Petitioner

Ms.Pandit, Assistant GOVERNMENT PLEADER,

for Respondent Nos. 1, 2

CORAM : MR.JUSTICE P.B.MAJMUDAR

Date of decision: 02/03/2001

ORAL JUDGEMENT

1. The petitioner herein had preferred an application before the Gujarat Public Works Contracts Disputes Arbitration Tribunal, which was registered as Arbitration Reference No.5 of 1996. It is the say of the petitioner-firm that the petitioner is running business as Engineers and Contractors and that they have undertaken the work of Modernising and Improving Shetrunji (P) Irrigation Scheme and for that purpose,

they entered into contract with the State of Gujarat and the Executive Engineer, Shetrunji (P) Modernisation Division No.1, Bhavnagar. The petitioner had filed the said Reference under Section 8 of the Gujarat Public Works Contracts Disputes Arbitration Tribunal Act, 1992 for settlement of dispute that has arisen between the parties and for awarding an amount of Rs.33,94,388/-, with interest at the rate of 20% per annum, from 21.3.1994 till realisation. The Reference was filed on 24th April, 1995. The Tribunal found that the Reference was time barred. Therefore, the Tribunal gave opportunity to the present petitioner to produce documentary evidence to show whether the Reference is within the period of limitation or not. The Tribunal, therafter, considered the relevant dates regarding Work Order, date of issuing the Work Order, the stipulated period for completion of the work in question, the application given by the petitioner to the Department for extension, etc. The Tribunal has also considered certain correspondence exchanged between the parties.

2. The Tribunal came to the conclusion that the said Arbitration Tribunal came into existence on 1.1.1992. The petitioner's Advocate has given names of three Arbitrators on 21.6.1994 and the Chief Engineer was called upon to select any one as the Sole Arbitrator. The Tribunal, therefore, found that right from 21.3.1994 to 21.6.1994, even after the Arbitration Tribunal came into existence, the petitioner's Advocate wanted to get out of the bar of limitation by resorting to Clauses 51 and 52 of the Tender Agreement. It was found by the Tribunal, therefore, that there was no necessity still to invoke Clauses 51 and 52 of the Tender Agrement, as, ultimately, at that time, the Tribunal was already in existence. Under these circumstances, it was found that attempt on the part of the petitioner to invoke Clauses 51 and 52 of the Tender Agreement after 1.1.1994 will not give a new life to the cause of action which has already become time barred and dead. Since the petitioner did not approach the Tribunal within the prescribed limitation period of one year from the date on which the dispute arose, the Tribunal found that the Reference was time-barred. The Tribunal also observed that the petitioner has rightly not submitted any application for condonation of delay because such application would have been outright rejected for want of sufficient cause. In view of the aforesaid observation made by the Tribunal, the Reference was rejected as time barred and the same was dismissed summarily. The aforesaid order is impugned in the present Revision Application.

3. At the time of hearing of this revision application, Mr.Parmar submitted that the petitioner was under a bona fide impression that since there was already an Arbitration Clause in the Agreement and unless the petitioner invokes Clauses 51 and 52, it may not give any cause of action to him, as, according to him, unless the claim is denied by the respondents, no cause of action can be said to be available to the petitioner. According to Mr.Parmar, unless the claim put up by the petitioner is rejected by the Department, it cannot be said that there was any dispute between the parties, which can be said to have taken place. According to him, on 16.6.1994, the Department refused to refer the matter to the Arbitrator and denied the claim of the petitioner and from that date, the dispute came into existence and within one year from that date, Reference was filed. As the Reference was filed on 24.4.1995, according to him, if one year's period is considered from 16.6.1994, the Reference was made within one year, i.e. within the period of limitation. Section 8 of the Act is required to be referred at this stage, which reads as under :-

> " ... ...
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> Section 8(1)- Where any dispute arises between the parties to the works contract, either party shall, irrespective of whether such works contract contain an arbitration clause or not, refer, within one year from the date when the dispute has arisen, such dispute in writing to the Tribunal for arbitration in such form and accompanied by such documents or other evidence and by such fees, as may be prescribed.
>
> ... ..."

Section 17 reads as under :-

> " ... ...
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> 17. Extension of period of limitation in certain cases :- The Tribunal may admit a reference under sub-sec. (2) of Sec. 8 or entertain an application for review under sub-sec. (1) of Sec. 11 or for revision under sub-sec. (1) of Sec. 12 after the period of limitation laid down in sub-sec. (1) of Sec. 8, sub-sec.(2) of sec. 11, or as the case may be, sub-sec. (1) of Sec. 12 if the party satisfies the

Tribunal that the party had sufficient cause for not making the reference or, as the case may be, the application for review or revision within such period.

... ..."

4. Mr.Parmar has relied upon the judgment of this Court in B. Patel & Co. v. State of Gujarat & anr., XXXIX(3) GLR 1913. This Court has taken the view that where the right to make reference has arisen before 1.1.1994, the period would expire on 31.12.1994 and where the right arises after 1.1.1994, the period of limitation is one year from that date. According to Mr.Parmar, therefore, when the Department denied the claim of the petitioner on the aforesaid date, i.e. 16.6.1994, only at this time the dispute between parties arose, for which reference could have been made to the Tribunal by making application. Mr.Parmar, therefore, submitted that considering the facts and circumstances of the case, the Tribunal should have held that the Reference was within the period of one year and was required to be adjudicated on its own merits.

5. Ms.Pandit, learned AGP, on the other hand, argued that when the Act came into existence on 1.1.1992, it was not necessary for the present petitioner even therafter to go on invoking Clauses 51 and 52 of the Agreement between the parties and it was not necessary for the petitioner even to go on suggesting the names of Arbitrators etc. and at that time, the petitioner should have made reference to the Tribunal as the Tribunal was available on and from 1.1.1994. In her submission, therefore, the Tribunal's order does not require to be interfered with.

6. Considering the argument of both the sides, especially when this Court has already taken the view to the effect that when the dispute can be said to have come into existence when the claim was denied by the Department, I think that the Tribunal should have adjudicated the aforesaid Reference on its own merits without throwing it away on the ground that it was time barred. It is no doubt true that after 1.1.1992, it was not necessary for the petitioner still to invoke clauses 51 and 52 of the Agreement. However, there is some substance in the say of Mr.Parmar that unless the claim was denied by the Department, it cannot be said that there was any matter which was required to be referred to the Tribunal, or there was any dispute which can be said to have arisen between the parties. According to

Mr.Parmar, ultimately, if the Department has accepted the say of the petitioner and might have settled the dispute, there was no cause of action till that date available for the applicant to approach the Tribunal and, therefore, there is some substance in the say of Mr.Parmar that the cause of action arose when the Department refused to accept the claim of the applicant on 16.6.1994 and from that date, reference was filed within the period of limitation. It is no doubt true that the petitioner should have been more vigilant, but, in any case, looking to the aforesaid facts, it cannot be said that the Reference is prima facie time barred and the same was required to have been considered on merits by the Tribunal. Even otherwise, there is also a power available with the Tribunal under Section 17 of the Act, even if the Reference is time barred. It is no doubt true that no separate application was filed by the petitioner in that behalf. However, looking to the facts and circumstances of the case, as the petitioner was asserting his right from the Department and, ultimately, time was consumed in correspondence with the Department and ultimately, when the petitioner was told by the Department that his claim was not required to be accepted, at that stage, if he had approached the Tribunal, liberal view should have been taken by the Tribunal even by condoning the delay and the Reference should have been decided on merits. It is no doubt true that the petitioner should have made formal request for condonation of delay by filing substantive application as required under Section 17 of the Act. Now, since the facts of the case as well as the documents are also already produced before the Court, instead of directing the petitioner to follow the aforesaid course of action, I am of the opinion that the Tribunal should decide the aforesaid Reference on its own merits. Accordingly, the Reference filed by the petitioner is treated to be within the period of limitation. Alternatively, even if there is a delay, in the facts and circumstances of the case, the same is condoned as per the provisions of Section 17 of the Act. The effect of this order is that the Tribunal may adjudicate the aforesaid reference on its own merits and dispose of the same.

7. It is now required to be clarified that it was pointed out by the learned AGP that the present petitioner has already filed a suit, being Special Civil Suit No.150 of 1996, before the Court of Civil Judge (S.D.), Gandhinagar, for an injunction against the Department from recovering any amount. It is clarified that so far as the aforesaid suit is concerned, the same shall have to be proceeded on its own merits and that has

nothing to do with any reference pending before the Tribunal in this connection. Mr.Parmar for the petitioner has also assured that he will not take any adjournment from the Civil Court on the ground that the reference is pending before the Tribunal. The Civil Court is, therefore, directed to decide the said suit on its own merits without being influenced by the present order or considering the fact that the Reference of the present petitioner is pending before the Tribunal. The petitioner has also filed an undertaking before this Court, which is also taken on record, wherein it is stated that, ultimately, if any amount of the Government is required to be paid in view of the default on the part of the petitioner, the same shall be returned with interest at the rate of 18% per annum and that if the present C.R.A. is allowed and the matter is sent back to the Tribunal, the aforesaid order will not be taken as a defence in the suit, which is pending in the Court of Civil Judge (Senior Division) at Gandhinagar, being Special Civil Suit No.150 of 1996. Accordingly, the said suit naturally is required to be decided on its own merits without in any way taking into consideration whether any dispute or reference is pending before the Arbitration Tribunal regarding the claim involved in the proceedings. The learned Civil Judge (Senior Division), Gandhinagar is directed to proceed with the said suit on its own merits and dispose of the same and if Exhibit 5 is not decided one way or the other, the same may be decided at the earliest, at any rate before 30th April, 2001.

8. A copy of this order may also be sent to the Civil Judge (S.D.), Gandhinagar before whom Special Civil Suit No.150 of 1996 is pending. This C.R.A. is accordingly allowed as per the observations made earlier. The Tribunal may accordingly restore the aforesaid Reference on file, being Arbitration Reference No.5 of 1996, and may dispose of the said Reference in accordance with law and on merits. Rule is accordingly made absolute to the aforesaid extent with no order as to costs.

It is clarified that this Court has not expressed any opinion on the merits of the Civil Suit which is pending before the learned Civil Judge (Senior Division), Gandhinagar and the learned Judge may decide the same on its own merits and in accordance with law. It is also clarified that by giving undertaking before this Court, it should not be construed that the present petitioner has admitted the aforesaid claim and, ultimately, all these questions are required to be decided by the Civil

Court, including the question whether any injunction can be granted in law in favour of the petitioner or not.

(P.B. Majmudar, J.)

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(apj)